

PUBLIC HEARING

STATE OF CALIFORNIA

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF THE WORKERS' COMPENSATION  
SCHEDULE FOR RATING PERMANENT DISABILITIES

ELIHU HARRIS STATE BUILDING  
1515 CLAY STREET  
OAKLAND, CALIFORNIA

TUESDAY, JULY 22, 2008

10:15 A.M.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

## APPEARANCES

Carrie Nevans, Hearing Moderator

Susan Gard, Chief of Legislation & Policy

George Parisotto, Counsel, DIR

Maureen, Gray, Regulations Coordinator, DIR

## SPEAKERS

Linda Atcherley - Legislative Chair, California Applicants'

Attorneys Association, Immediate Past President

Sue Borg - President, California Applicants' Attorneys

Association

Christy Bouma - Governmental Advocate, California

Professional Firefighters

Broyles, Julie - California Association of Joint Power

Authorities

Steve Cattalica - Director, Government Relations California

Society of Industrial Medicine and Surgery

Kathleen Collins - Vice President, Bargaining SEIU, Local

1000

Deanna Furman - Legislative & Community Advocate California

Nurses Association

Mark Gerlach - Consultant, California Applicants' Attorneys

Association

## SPEAKERS (Continued)

Joanna Gin - Legislative Advocate, SEIU, Local 1000

Scott Lipton - California Coalition on Workers'  
Compensation

Mike McClain - Vice President, California Workers'  
Compensation Institute

Tom Rankin - California Alliance for Retired Americans

Terry Re - Service Employees International Union, SEIU

Jeff Rush - Senior Claims Administrator California State  
Association of Counties Excess Insurance Authority

Liberty Sanchez - Legislative Analyst Broad & Gusman,  
Teamsters Union

Angie Wei - California Labor Federation

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1 PROCEEDINGS

2 MODERATOR NEVANS: Good morning. Thank you  
3 for coming here today. Let's go ahead and start this  
4 public hearing on the 2009 Permanent Disability Rating  
5 Schedule. This will be effective for injuries occurring  
6 on and after January 1st, 2009.

7 My name is Carrie Nevans. I'm the  
8 Administrative Director of the Division of workers'  
9 comp. Beside me I have Susan Gard, the Division's Chief  
10 of Legislature and Policy.

11 MS. GARD: Good morning.

12 MODERATOR NEVANS: And on the other side of  
13 her is George Parisotto. He's the DWC attorney who's  
14 been working on the Permanent Disability Rating  
15 Schedule. Over here at the table we have a court  
16 reporter who will taking a transcript of today's  
17 hearing, and Maureen Gray, who's our Regulations  
18 Coordinator.

19 When you come forward to testify, please give  
20 Maureen your card so we can get your name and your  
21 affiliation accurately. If you don't have a card,  
22 please spell your name before you start your testimony.

23 We're going to be accepting comments through 5  
24 p.m. today. One thing that we're going -- we may do  
25 today that may be a little bit different is we have a

1 group coming over from the Labor Federation at about  
2 12:30 or 12:45. If we finish testimony before that  
3 time, we're going to take a break and then reconvene at  
4 that time so we're here to take their testimony when  
5 they get here. They're at a convention over at the  
6 Marriott just a couple of blocks away. So we may end up  
7 having like a little break and then coming back in to  
8 conclude.

9 We had a large hearing yesterday in Los  
10 Angeles with a lot of press and a lot of injured workers  
11 and their families there. The purpose of the hearing  
12 today, like yesterday, is to receive your comments on  
13 the proposed regulations.

14 Everything that's said in today's hearing will  
15 become a part of the official record that goes to the  
16 Office of Administrative Law, and including written  
17 comments will also become part of the official record.

18 We're not going to enter into discussions with  
19 you this morning. We're taking your testimony only, but  
20 we may ask you to clarify something that you said. We  
21 have a sign-in sheet of people that are -- asked to  
22 testify. I'm going to go through the list. At the end,  
23 if there's anybody who wants to testify who did not sign  
24 in, they will have the opportunity to come up at that  
25 time.

1                   So let's go ahead and get started with the  
2     first person on our list, which is Libby Sanchez,  
3     representing the Teamsters.

4                   MS. SANCHEZ: Good morning, Administrative  
5     Director Nevans and other panel members. Liberty  
6     Sanchez on behalf of the Teamsters, Amalgamated Transit  
7     Union, United Food and Commercial Workers Union, Unite  
8     Here Machinists, EFC, IFPT Local 21, Scope, which is the  
9     public sector wing of Liona, and I think that's it this  
10    morning.

11                  I wanted to start by saying that, you know,  
12    four years out after implementation of SB899 and the  
13    dramatic permanent disability benefit reduction which  
14    were the result of the regulations which were  
15    promulgated by then Administrative Director Andrea Hoag,  
16    we're very appreciative of the Division's willingness to  
17    review the existing Permanent Disability Rating Schedule  
18    and to propose an increase to that schedule.

19                  Unfortunately, the proposed increase would  
20    result in only about a 16 percent increase in the  
21    (inaudible) to the permanent disability ratings which  
22    are provided for under the existing Permanent Disability  
23    Rating Schedule.

24                  In light of the fact that the previous  
25    Permanent Disability Rating Schedule, which this

1 proposal seeks to amend, resulted in an approximate 50  
2 percent reduction to those individuals who continue to  
3 be rated, and a 30 percent reduction in the number of  
4 individuals who were previously entitled to be rated  
5 under the old system and now are no longer rated in  
6 accordance with the existing system.

7           This 16 percent proposed increase is -- is  
8 dramatically insufficient. You know, I think that in  
9 this economic time, you know, where people are  
10 struggling to, you know, pay for gas and struggling to  
11 pay for food, you know, a 16 percent increase when folks  
12 should really be entitled to about 50 percent more than  
13 they are, is -- is insufficient at best, and egregious  
14 at worse.

15           You know, one -- one anecdote, and you know  
16 it's not an anecdote to the individual who -- who is  
17 experiencing this, but just one story is we have a  
18 Teamster member who was a 12-year employee at a grocery  
19 store in the warehouse, and he suffered a herniated  
20 disc. Obviously he's unable to continue performing the  
21 work that was doing. He received a 13 percent rating,  
22 PDRS rating, under the new schedule, which resulted --  
23 he received no training, no retraining, no additional  
24 benefits.

25           So he, you know, lost his house. He's got



1 three kids and a wife. He moved into an apartment, lost  
2 that apartment, got evicted. And now he and his wife  
3 and three kids are living in the back room of his  
4 mother-in-law's house. And, you know, these are --  
5 these are real people that are really, really suffering,  
6 and you know, this is just one story of many. This is  
7 -- you know, but -- you know. It's -- it's really  
8 devastating when a loss like this occurs and then to --  
9 to have to come to the understanding that the  
10 fundamental bargain that all workers rely on that, you  
11 know, was constitutionally, you know, entered into in  
12 1913 that said, you know, hey, if you work and you get  
13 injured, your -- your employer's going to take care of  
14 you.

15 To come to that fundamental understanding that  
16 that bargain has been broken and that the employer is  
17 not going to take care of you and that you have no place  
18 to go and nowhere to turn and, you know, there aren't  
19 retraining benefits and there aren't alternative or  
20 modified jobs available to you; and to top that all off,  
21 the permanent disability benefits to which you were  
22 entitled are going to result in, you know, your home  
23 getting foreclosed, are going to result in not being  
24 able to feed your kids. It's devastating to a worker.

25 You know, the greatest concern I think we have

1 is that the underlying Permanent Disability Rating  
2 Schedule upon which the proposed regulatory changes are  
3 premised, we believe is -- is erroneously based. We  
4 believe that 4660 -- 4660 -- I'm sorry. Let me make  
5 sure I'm doing the appropriate references.

6 We believe that 4660 and 4660(b)1 and (b)2 do  
7 not provide for the FEC to be an adjustment factor, but  
8 rather provide for the FEC to be a component of the  
9 underlying rating. What that means in translation is  
10 that since everything gets an FEC, that even if the AMA  
11 guide, which is a component of the underlying PDRS, not  
12 the basis of the underlying PDRS, if everything is  
13 entitled to an FEC regardless of if the AMA portion in  
14 accordance with 4460(b)1 results in a zero, that doesn't  
15 mean you can't add an FEC adjustment factor to a zero;  
16 it means that everybody gets something.

17 Setting that aside, if you look at the -- what  
18 was in the law, what was in SB899, and if you look at  
19 the documentation associated with implementation of  
20 SB899, mainly the legislative history reflected in the  
21 analyses, any sort of letters, anything that you look at  
22 when you look at legislative history, there's absolutely  
23 no reference towards a reduction in permanent disability  
24 benefits, except for in two instances which are  
25 companioned with two increases to permanent disability

1     benefits, and those are the increase to the number of  
2     weeks for those persons who are rated at 70 percent and  
3     above, and a decrease to the number of weeks in the  
4     lowest ratings.

5             The other two references are the bump up in  
6     the amount of 15 percent for folks who were not offered  
7     return to work, and the bump down for those folks who  
8     are. So although, you know, I know I'm not supposed to  
9     presume anything, one would presume that if a 50 percent  
10    reduction in permanent disability or a 30 percent  
11    drop-off randomly for folks to not be rated any longer  
12    were intended by the legislature, it would have been  
13    mentioned either in the law or in some sort of analysis;  
14    but that is not the case.

15            Additionally disconcerting is the fact that as  
16    referenced in the -- let's see. I think it's page 4 of  
17    the documentation provided by the Division, it's  
18    referenced that there's a very small number of ratings  
19    that don't even provide for an average ratio, and that's  
20    -- that's less than 3 percent of all ratings. But  
21    included in that is the soft tissue category. And I  
22    guess that's really disconcerting to us because it is --  
23    it is assumed that a large portion of soft tissue  
24    injuries were those exact injuries that fell off the  
25    rating schedule via the 30 percent drop-off. And so to

1 have this soft tissue included in this, it -- it gives  
2 rise to the question of, well, do we -- do we really  
3 know any of this, you know.

4 So in conclusion, as I said at the outset, we  
5 are appreciative of the fact that the Administrative  
6 Director and her staff are reviewing this and are  
7 acknowledging the fact that there does need to be an  
8 increase. The increase is really insufficient. We  
9 don't believe it's in accordance with existing law, and  
10 we believe that at a minimum, the increase should be  
11 substantially more sufficient.

12 So thank you very much for your time.

13 MODERATOR NEVANS: Thank you. The next person  
14 who said -- checked that they would like to testify is  
15 Julie Broyles.

16 MS. BROYLES: Good morning. Julianne Broyles.  
17 I'm here on behalf of the California Association of  
18 Joint Powers Authorities, and did want to briefly  
19 mention a couple of items. First of all, we certainly  
20 agree with the comments that were presented by Mr.  
21 Lipton yesterday in Los Angeles, and want to make sure  
22 that we're associated with those; but additionally  
23 wanted to support the process that has been started by  
24 the Administrative Director and the Division in terms of  
25 using real data to come to conclusions on what should be

1 done with PDRS changes for this particular round and for  
2 any future round. We think it's very important that  
3 what was began with SB899's enactment and the  
4 requirement that data be used as the basis for  
5 decision-making on future increases, is the right way to  
6 go.

7 We also want to make sure that the Division  
8 understands that while the increases are being  
9 considered, one thing that we haven't really seen is a  
10 description of what the impact will be on the California  
11 business economy and employers overall, both public and  
12 private, and would hope that as the considerations go  
13 forward that you -- that when you look at what a 16  
14 percent increase, or whatever the increase ends up being  
15 if changes are added or made in the future, that that  
16 impact really be examined because the economy is going  
17 through such troubles at this point that we do want to  
18 make sure that those are considered as the long-term  
19 effect because once a change is made, of course we live  
20 with it for a very long time.

21 Last of all, we want to be sure that the  
22 Division knows that the California Association of Joint  
23 Power Authorities is here as a partner and wants to be  
24 included in any future stakeholder discussions on  
25 increases or changes to the schedule.

1                   And thank you for the opportunity to speak  
2   today.

3                   MODERATOR NEVANS:   Scoot Lipton.

4                   MR. LIPTON:   Administrative Director, panel  
5   members, Scott Lipton.   I don't have a business card so  
6   the last name is L-I-P-T-O-N.   On behalf of the  
7   California Coalition on Workers' Compensation, a not  
8   for-profit advocacy in education association  
9   representing public, private, and not for-profit  
10   employers up and down the State of California, I do want  
11   to echo on some sentiments that I made in Los Angeles  
12   yesterday and then also those made by Ms. Broyles  
13   earlier this morning, and that is to thank the  
14   Administrative Director and the Division for engaging in  
15   this process.

16                   This is a process that began, I think at its  
17   roots, immediately following the signature of SB899 on  
18   April 19th, 2004, but probably began in earnest at the  
19   outset of the 1/1/05 Permanent Disability Rating  
20   Schedule where there was a commitment to do -- to go  
21   through this process and engage in the studies and the  
22   empirical data collection that was necessary to consider  
23   any future revisions to the schedule.

24                   I would like to maybe not contradict, but at  
25   least carry a question to this idea of a ratings

1 decrease of 50 percent. As was noted in the initial  
2 Statement of Reasons by the Administrative Director that  
3 over a 42 month period, which is a significant portion  
4 of the period in which we're currently in, post-SB899  
5 and post the 1/1/05 PDRS, disability ratings have  
6 actually only dropped, as I understand it, on average of  
7 27 percent, and not some of the other numbers that we  
8 may have heard.

9 Second of all, I want to say that for the  
10 record, that it is CCWC believes -- CCWC's belief and a  
11 majority of the employer coalition that these  
12 regulations really only represent a modification of the  
13 1/1/05 PDRS, which at the time utilized the data  
14 available, and we believe -- as prescribed in Labor Code  
15 Section 4660. And we believe that this, this process,  
16 this revision to the '09, for this 1/1/09 disability  
17 rating schedule, again uses the data as available at the  
18 time; and we'd like that noted for the record and given  
19 recent court decisions and other case law that's come  
20 from the supreme court in the court of appeals.

21 Last -- thirdly, I want to note that should  
22 there be any significant changes to the Permanent  
23 Disability Rating Schedule, this 1/1/09 schedule, the  
24 coalition of employers would respectfully request  
25 secondary public hearings on the issue so we're allowed

1 to comment for the public record to the Administrative  
2 Director in a public forum. We believe this would be an  
3 important step going forward, again should this schedule  
4 be modified in this substantial way.

5 Again, this revision utilizing data on wage  
6 loss, which I think we can all probably agree -- we  
7 hope, at least the employer community agrees, is a  
8 significant component of this idea of permanent  
9 disability benefit. The data, as it relates to age and  
10 the injured body part, we believe in this schedule has  
11 led to a more equitable distribution of permanent  
12 disability benefits.

13 This concept of equity to distribute the  
14 benefit is the only issue we believe forged the AD can  
15 promulgate regulations. This goes directly to the core  
16 of adequacy versus equity. Adequacy is nowhere -- and  
17 significant research into the Labor Code and the  
18 Constitution has illustrated this. Adequacy is nowhere  
19 described or statutorily regulated in the Labor Code or  
20 in the Constitution. Article 4, Section 14 of the  
21 California State Constitution leaves plenary authority  
22 on the workers' comp system up to the legislature. And  
23 should there be any future discussion of adequacy, it is  
24 our belief where that issue should be addressed.

25 Again, I want to thank the Division for its



1 time, for its process. CCWC and our partners in the  
2 employer community, public and private, would like to be  
3 a part of any process going forward and we thank you for  
4 your time.

5 MODERATOR NEVANS: Thank you. Jeff Rush.

6 MR. RUSH: Thank you for the opportunity to  
7 speak today. I'm Jeff Rush, representing the California  
8 State Association of Counties Excess Insurance  
9 Authorities. We are members as well of the preceding  
10 speaker's organization, CAJPA and CCWC. We represent  
11 the largest group of publically insured entities  
12 throughout the country. Over 1,600 members of  
13 California's public entities, county, city school  
14 districts belong to our organization and pool their  
15 workers' compensation costs to save the cost of those  
16 benefits and be able to pass it on in terms of providing  
17 the important services they do.

18 We take very seriously any -- any  
19 consideration of increase of benefits because in doing  
20 so it reduces the capacity to provide police services,  
21 to provide fire, to provide educational services and  
22 those of our other special districts. And we  
23 concurrently express our appreciation to the Director  
24 and to the DWC for the thorough research which is being  
25 done to objectively determine what, if any,

1 modifications need to be made to the schedule. And our  
2 membership is very supportive of that effort and of the  
3 results that have come forth to this point.

4 I would like to cite some of the prior  
5 comments as a person who spends the majority of his time  
6 working on claims and overseeing claims and disability  
7 benefits. There's been reference to the fact that  
8 benefits are down 50 percent or 29. I would like to  
9 make known the fact that where benefit levels were at  
10 prior to SB899 is what I call a broken benchmark. And  
11 the reason I call it that is because many injured  
12 workers received ratings that were simply not  
13 substantiated by, in many cases, objective findings or  
14 work restrictions under the old schedule.

15 I have personally seen cases where injured  
16 workers receive tens of thousands of dollars solely on  
17 the basis of subjective complaints. Under the new  
18 schedule, these people would have little to no  
19 impairment. That may constitute a large portion of the  
20 30 percent of injured workers that no longer have a  
21 rating.

22 So rather than viewing the old schedule and  
23 the levels of disability associated with it as a target,  
24 I believe that as the Division has correctly done, we  
25 are to work from the current schedule. And if that

1 effort needs to be an increase, so be it. And the  
2 numbers that have been provided by the Division warrant  
3 some degree of an increase, perhaps; but we don't want  
4 to see the prior schedule used as a target because it  
5 was indeed a broken benchmark. Let's work on the  
6 current schedule and the objective measurements that  
7 have been taken in terms of age and also in terms of the  
8 FEC and proceed accordingly.

9 And as was mentioned by earlier speakers as  
10 well, it further changes our (inaudible) to those which  
11 are currently proposed. CSACIA would appreciate an  
12 opportunity to have public hearings and offer further  
13 comment. Thank you.

14 MODERATOR NEVANS: Sue Borg.

15 MS. BORG: I hope you can see me over this.  
16 On behalf of CAAA, I'm here to strongly oppose the  
17 proposed revision of the 2005 PDRS. The Administrative  
18 Director was charged with the responsibility to collect  
19 data and to determine the effect of the DFEC adjustment  
20 on PD ratings and to revise these adjustment factors to  
21 reflect an injured worker's diminished earning capacity  
22 due to injury.

23 Well, the studies have been done and the data  
24 is in. There can be no question that the aggravated  
25 fact of the Diminished Future Earning Capacity

1 adjustment under the 2005 PDRS has been to cut PD  
2 benefits by more than half.

3 It is important to recognize that this 50  
4 percent reduction, which is due solely to the FEC  
5 adjustments in the 2005 PDRS, is in addition to the  
6 other cuts in the PD benefits of at least 35 percent  
7 that are the result of the additional statutory changes  
8 adopted with SB899.

9 Taken together, these statutory changes, plus  
10 the effect of the FEC adjustments, have reduced  
11 permanent disability compensation to injured workers by  
12 nearly 70 percent. The intent of SB899 was to make the  
13 PD rating system more consistent and more objective.  
14 There was no intent to reduce benefits beyond the  
15 enumerated changes in the statute.

16 Unfortunately, despite the overwhelming  
17 evidence of this huge unintended cut caused by the  
18 introduction of the 2005 PDRS, the proposed 2009 PDRS  
19 does almost nothing to correct the situation.

20 The proposed changes at issue today will  
21 increase the average PD award by just 16 percent,  
22 leaving permanent disability compensation in California  
23 down more than 60 percent from pre-reform levels. This  
24 is simply unacceptable.

25 Multiple RAND studies concluded that

1 pre-reform benefit levels were already inadequate, and  
2 today California is in the disgraceful position of being  
3 at the bottom of the 50 states in how we compensate the  
4 men and women who are injured on the job.

5 Despite assertions to the contrary, the new  
6 PDRS is not empirically based, but as was true with the  
7 2005 schedule, it is the product of an arbitrary policy  
8 decision by the Division. There is nothing in the  
9 studies done by the Division or in any other empirical  
10 data that in any way supports the proposed FEC range of  
11 1.2 to 1.5.

12 As a result, ratings assigned under the  
13 proposed 2009 PDRS are not empirically based, and awards  
14 under this schedule will be no more equitable than the  
15 1997 PDRS and far more inadequate.

16 CAAA strongly urges the Division to discard  
17 this totally inadequate and flawed proposal and adopt  
18 instead a truly empirically-based rating schedule that  
19 fully complies with both the letter and the intent of  
20 SB899.

21 Our detailed written response has just been  
22 filed, and it includes a full description of methodology  
23 for calculating empirically-based Future Earnings  
24 Capacity adjustments. Mark Gerlach will testify shortly  
25 about this methodology.

1           Our proposed methodology does not roll back  
2     the reforms of SB899. On the contrary. The  
3     empirically-based FEC adjustment factors we propose  
4     simply correct the unintended cuts accomplished by the  
5     2005 PDRS. Our proposal does nothing to change the  
6     enumerated revisions in SB899 that reduce permanent  
7     disability benefits by more than 35 percent. In fact,  
8     even with our proposal, PD benefits in California would  
9     be well below the 2/3s replacement level considered the  
10    benchmark for adequacy in multiple RAND studies of the  
11    California Workers' Compensation System.

12           And I want to point out that even the  
13    Republican insurance commissioner has stated that such  
14    an increase would not increase insurance premiums to  
15    employers. In addition to the adoption of an  
16    empirically-based FEC adjustment, we also strongly urge  
17    that the Division amends the formula for combining  
18    impairments and disabilities. The combined values table  
19    was designed to enable the physician to account for the  
20    effects of multiple impairments with a summary value.

21           So a standard formula was used to ensure that  
22    regardless of the number of impairments, the summary  
23    value would not exceed 100 percent of the whole person.  
24    In California, the Labor Code ensures that the summary  
25    value would not exceed 100 percent, rendering the

1 subjective of the combined values tables superfluous.

2           The problem is that although the intended  
3 purpose of the combined value table is to reduce the  
4 additive effect of multiple impairments, the real impact  
5 is to lower the final rating, the disability rating, for  
6 workers with multiple disabilities. This completely  
7 flies in the face of the empirical data from the  
8 Division's return to work and wage loss studies, which  
9 clearly demonstrate that workers with multiple  
10 disabilities have the worst return to work rate.

11           Earlier data from RAND showed that workers  
12 with multiple disabilities have significantly higher  
13 proportional earnings losses than workers with a single  
14 disability. Thus, the empirical data clearly supports  
15 that the disability rating for workers with multiple  
16 disabilities should be significantly higher than the  
17 ratings assigned to workers with single disabilities.

18           We believe that an empirically-based combined  
19 values table would, as noted in the AMA guides, produce  
20 a summary rating that is more than additive. We urge  
21 the Division to collect and analyze data to develop a  
22 new table. We realize at this time that there may not  
23 yet be sufficient data available to develop a completely  
24 empirically-based table. Nevertheless, as we noted  
25 earlier, there is more than enough data to show that the

1 continued use of the current table violates the mandate  
2 of Labor Code Section 4660.

3 Therefore, we strongly urge to the Division to  
4 amend the formula for combining impairments and  
5 disabilities in this draft to provide that after an  
6 impairment rating has been adjusted for age and  
7 occupation, the disability for that body part shall be  
8 combined with disability ratings for other body parts by  
9 adding together the disability rating subject to the  
10 statutory limitations in Labor Code Section 4664(c)2.

11 CAAA also objects to the proposal to modify  
12 age adjustments in the 2009 PDRS. While there is some  
13 limited data that appears to justify the proposed  
14 changes, we believe that the data has significant flaws.  
15 First, the data only looks at lost earnings for a  
16 three-year period following the date of injury. It is  
17 highly unlikely that three years of earnings data is  
18 sufficient to analyze wage loss patterns by age.

19 RAND studies generally looked at ten years of  
20 earnings losses, and they have found that there was  
21 significant wage loss that continued after three years  
22 and five years and even beyond ten years. Numerous  
23 state and federal statutes protect the rights of older  
24 workers, not only as individuals but as a group, since  
25 they face unique obstacles in later phases of their



1 careers.

2 We do not believe that the currently available  
3 data showing three years of earnings losses adequately  
4 measures the true impact on older workers who, as noted  
5 above, face unique obstacles in the later phases of  
6 their careers.

7 We also believe that the data is of  
8 questionable value because it was collected prior to the  
9 elimination of the vocational rehabilitation program.  
10 Workers who are unable to return to their usual  
11 occupation following a workplace injury, face major  
12 obstacles in finding alternative work. Without  
13 vocational rehabilitation, many of these men and women  
14 have very limited prospects.

15 Currently -- consequently, CAAA strongly urges  
16 that the Division postpone any revision of the age  
17 adjustment factors until sufficient data is available to  
18 measure long-term earnings losses of disabled workers by  
19 age group.

20 The California Constitution requires that the  
21 state provide for a complete system of workers'  
22 compensation with adequate provision for the health,  
23 safety, and general welfare of injured workers and those  
24 dependent on them for support.

25 With this proposed PDRS, this administration

1 continues to ignore the overwhelming evidence that shows  
2 both the inequity and the inadequacy of the permanent  
3 disability compensation, thumbing its nose not only at  
4 the legislature, which clearly mandated an  
5 empirically-based schedule that was both equitable and  
6 adequate, but also at the Constitution of our state  
7 which envisioned a system where injured workers would  
8 receive substantial justice following a work injury.

9 This grave injustice cannot continue, and we  
10 urge the Division to do the right thing and propose a  
11 PDRS which is adequate and equitable and based on  
12 empirical data. This is what was required by SB899.  
13 Thank you.

14 MODERATOR NEVANS: Deanna Furman.

15 MS. FURMAN: Good morning, Administrative  
16 Director and panel members. I'm Deanna Furman, on  
17 behalf of the California Nurses' Association. We are  
18 also here to oppose the proposed increase to the PD  
19 schedule. Although we appreciate the review and the  
20 proposed increase, we don't believe that it goes far  
21 enough. 16 percent is clearly not enough for injured  
22 workers.

23 Employers and insurers are now saving 70  
24 percent on their permanent disability costs compared to  
25 four years ago. Adopting AMA evaluations for permanent

1     disability has resulted in 1/3 of injured workers who  
2     used to get a PD rating now are getting no rating or PD  
3     benefits at all. The remaining 2/3 of injured workers  
4     with PD ratings have seen their benefits slashed by over  
5     50 percent.

6             Our members are 95 percent women workforce.  
7     And when RNs are injured on the job, they frequently  
8     face serious consequences in their work-related injuries  
9     and serious limitations to perform their jobs, which are  
10    intensely physical.

11            Nursing surveys reveal that 83 percent of  
12    nurses work in spite of that pain; 52 percent report  
13    chronic back pain; and 12 percent leave the profession  
14    and say back injuries were the main or significant  
15    reason.

16            Often RNs who are unable to lift more than 20  
17    pounds will be -- this will be a career-ending factor,  
18    and it would classify as permanently disabled resulting  
19    in huge impacts on lifetime earnings and their ability  
20    to care for themselves. Some of our young members, RNs  
21    sometimes in their 20s, have been so disabled from back  
22    injuries that they will never be able to work without  
23    pain, much less support themselves.

24            We want to know that if and when work-related  
25    injuries do occur, that nurses and other healthcare

1 workers will know that if they become permanently  
2 disabled, the benefits that they will receive will  
3 ensure their financial needs are met.

4 We believe that doubling the award is not too  
5 much to ask, and it would just restore the benefits that  
6 the legislature never intended to cut. On behalf of all  
7 the RNs who have been injured at work, we propose that  
8 you augment the proposed regulations to increase these  
9 benefits, like I said, to at least double the rate. And  
10 thank you very much for your time.

11 MODERATOR NEVANS: Mark Gerlach.

12 MR. GERLACH: Good morning. My name is Mark  
13 Gerlach, G-E-R-L-A-C-H, Consultant with the California  
14 Applicants' Attorneys Association. The interesting  
15 thing is that I want to first say that I agree with  
16 some of the earlier speakers from the employer  
17 community. The requirement here is to have an  
18 empirically-based rating schedule. The problem is we  
19 don't have one. We don't have one in 2005, and the  
20 proposed schedule is not empirically based either.

21 To explain that I would like to give a little  
22 background here, starting with Section 4660 of the Labor  
23 Code. Section (b)2: For purposes of this section, an  
24 employee's Diminished Future Earning Capacity shall be a  
25 numeric formula based on empirical data and findings

1     that aggregate the average percentage of long-term loss  
2     of income resulting from each type of injury for  
3     similarly situated employees.

4             The Administrative Director shall formulate  
5     the adjusted rating schedule based on empirical data and  
6     findings from the evaluation of California's Permanent  
7     Disability Rating Schedule, interim report December 2003  
8     prepared by the RAND Institute for Civil Justice, and  
9     upon data from additional empirical studies.

10            So why did they adopt that. They adopted that  
11     basically because RAND had done some studies of the  
12     permanent disability rating system. The first problem  
13     that RAND came across was how do you evaluate a system  
14     that's based upon work restrictions.

15            Let's say Ms. Nevans has an injury to her  
16     shoulder that causes her to not be able to lift heavy  
17     objects. What's that worth? Should it be a 5? Should  
18     it be a 10? Should it be a 20? Should it be a 50? Who  
19     knows. There's no basis for you to say it should be any  
20     number.

21            What if Ms. Gard has a knee injury that causes  
22     her to be unable to walk on uneven ground. Is that a 5?  
23     Is that a 10? Is that a 20? Where should it be? RAND  
24     said we can't evaluate the permanent disability system  
25     without knowing how to quantify what is the severity of

1 your disability. So they came up with a methodology to  
2 do that.

3 You get the mouse; you get something. They  
4 came up with a methodology to measure the earnings loss  
5 of the injured workers following their workplace injury,  
6 and they quantified that earnings loss as the severity  
7 of the disability. So that's what Diminished Future  
8 Earnings Capacity is. It's a quantification of the  
9 severity of the disability.

10 And then RAND said, well, what we need to do  
11 then is we need to get the schedule so that the rating  
12 reflects that quantification of the severity of the  
13 disability. That makes sense. It's kind of like when  
14 you measure your feet size, you want to get a shoe that  
15 fits your shoe size, the measurement that you just made.

16 So RAND said, let's get an empirically-based  
17 schedule based upon Diminished Future Earning Capacity.  
18 Now, with that schedule, with that measurement of  
19 Diminished Future Earning Capacity, they weren't able to  
20 do a number of things in setting up their schedule.

21 The first thing they did is they looked at  
22 adequacy. Now whether or not the language of 4660  
23 discusses adequacy is something I'm going to come back  
24 to in a minute, but it is beyond a shadow of a doubt  
25 that RAND found that permanent disability benefits under

1 the 1997 schedule were inadequate.

2 For those who still claim to the belief that  
3 there's no evidence of that, I invite you to read three  
4 sterling exciting reports by the RAND Institute. They  
5 are unequivocal. Robert Reville in testimony before the  
6 Senate Labor and Industrial Relations Committee in  
7 response to a question in December of 2004 from Senator  
8 Kuehl said, yes, we found in multiple studies, benefits  
9 were inadequate.

10 What else could they find out. Well, they  
11 found out that you could measure equity by this also.  
12 They found out that Ms. Nevans' injury caused her to  
13 lose 20 percent of her income after she came back after  
14 her disability was adjudged permanent and stationary;  
15 whereas Ms. Gard lost only 10 percent of hers.

16 You could say that there is a ratio, a balance  
17 there that we could look at when we're setting our  
18 ratings so that if two -- two workers suffer the same  
19 Diminished Future Earning Capacity, if they suffered the  
20 same earnings loss, they should get the same rating  
21 whether it's a shoulder injury or a knee injury. Or if  
22 two workers with different earnings losses get the same  
23 rating, that's inequitable. So we have a definition  
24 here of equity. Equity is when you give the same rating  
25 to people with the same earnings loss, and people with

1 different earnings losses have -- if people have  
2 different earnings losses, they should get different  
3 ratings.

4 Now, RAND then developed a methodology because  
5 these are numbers. They developed a methodology to  
6 actually measure this equity, and these are the famous  
7 ratios in Table B. That's what those ratios do. They  
8 measure equity. That is a quantifiable measurement of  
9 equity. How does it measure equity? Well, the ratios  
10 look at what the comparison between the rating  
11 percentage is and what the earnings loss percentage is.

12 So, for example, if Ms. Nevans lost 10 percent  
13 of her earnings and had a 10 percent rating, that would  
14 be a ratio of 1.0. Ms. Gard also had a 10 percent  
15 earnings loss, but she got a rating of 20; that would be  
16 a 2.0 ratio. Now, remember, the equity argument is that  
17 if they both have the 10 percent earnings loss, they  
18 should get the same rating; but one got a 10 percent  
19 rating, one got a 20 percent rating. So the difference  
20 between the 1.0 and the 2.0 in the ratios is a  
21 measurement of that inequity.

22 So when we say that the data in the original  
23 RAND study had a four to one relationship between the  
24 highest and lowest ratio, that's a measurement of  
25 inequity. That four to one relationship between the



1 highest and lowest defines what the inequity was under  
2 the old schedule. And that inequity was part of the  
3 reason why we, the legislature in California, decided we  
4 needed to change our system to a more objective system,  
5 get to an empirically-based system.

6 So what did we get to. Well, we got to a  
7 system where the ratios in Table B now are five to one.  
8 We have a more inequitable schedule now under the 2005  
9 schedule than we had under the 1997 schedule. It's not  
10 me saying that. It's the numbers saying that. That's  
11 what the numbers tell us. That's a measurement of the  
12 inequity of the schedule. But RAND came up with a  
13 methodology to correct this, and that's where we get  
14 into some of the language of the statute, why I read the  
15 statute, because RAND -- the statute talks about a  
16 numeric formula.

17 Well, RAND proposed a numeric formula that  
18 starts with those ratios. They define it in a number of  
19 places, but one of the places they define it is in the  
20 final report. Okay. The 2003 report was the interim  
21 report. They eventually put out the final report. Same  
22 study, but it's the final report. What did they say in  
23 the final report. Page 59, RAND's 2005 report entitled  
24 An Evaluation of California's Permanent Disability  
25 Rating Schedule. It says, the ratios shown in the fifth

1 column of Table 5.1 -- and those are the ratios that are  
2 in Table B -- the ratios shown in the fifth column of  
3 Table 5.1 are the measures from which we could in  
4 principal compute adjustments for the various  
5 impairments to improve the horizontal equity of the  
6 rating system. We could simply choose a baseline  
7 impairment category and then divide that impairment  
8 types ratio of ratings to losses by the ratio of all  
9 other impairment types listed in the table. The result  
10 would provide us with the appropriate adjustment factor  
11 for each type of impairment to equalize the relationship  
12 between average ratings and average proportional losses.

13 That's a lot of language, but what it does is  
14 it defines a mathematical formula that uses the ratios  
15 as the starting point, and it equalizes those ratios.  
16 That's the point we want to get to. Every ratio should  
17 be the same. That is equity. That is the purpose of  
18 having an empirically-based schedule.

19 Our proposal uses data that was released by  
20 the Division of Workers' Compensation to do that. I'm  
21 not going to go through the whole proposal because,  
22 frankly, it's not very complicated. You simply use the  
23 ratios, develop an adjustment factor from the ratios,  
24 and develop FEC factors.

25 I do want to talk about the question of

1     adequacy, however. Our proposal does not, as pointed  
2     out by Ms. Borg, move permanent disability benefits to  
3     the standard of adequacy as defined by RAND. It does  
4     not make that change. We heard today testimony saying  
5     the Administrative Director only has the authority to  
6     change equity and to equalize the equity among rates,  
7     among benefits.

8             Well, if that is the only authority of the  
9     Administrative Director, you made a big mistake in 2005  
10    because you reduced benefits by 50 percent. And if you  
11    don't have the authority to change it now, you didn't  
12    have the authority to change it then.

13            Now we heard some questions about, well, are  
14    benefits down 50 percent. I'm sorry. That train has  
15    left the station. Mr. Lipton was not standing up in  
16    front of the insurance commissioner a year and a half  
17    ago telling him not to reduce insurance rates when the  
18    insurance commissioner said permanent disability  
19    benefits are down 50 percent. He wasn't before the  
20    insurance commissioner last August saying the same  
21    thing. He wasn't before the insurance commissioner when  
22    the January 2008 rates came out saying the same thing.

23            We have rates adopted by the insurance  
24    commissioner that are based upon the assumption that a  
25    50 percent decrease was caused by the adoption of the

1 2005 Permanent Disability Benefit Schedule, rates  
2 adopted through the regulatory process. That train has  
3 already left the station.

4 Benefits are down 50 percent. Our proposal  
5 reverses that 50 percent change in compliance with the  
6 employers directive that the Administrative Director  
7 should not change the adequacy level of benefits. It is  
8 simply absurd to contend that because we went to a more  
9 objective schedule, that for those workers who receive  
10 an objective rating under the AMA guides, that it's all  
11 right to cut their benefits by 50 percent.

12 Whatever you thought about the old schedule,  
13 and as I point out, RAND said the old schedule was  
14 inadequate. Whatever you think about it. There's no  
15 justification for saying, well, the 70 or 80 percent of  
16 the workers who get an objective rating, they should be  
17 cut by 50 percent. That's just not there. It's not in  
18 the statute. It was not in the intent. The employers  
19 agreed that the Administrative Director should not be  
20 changing the benefit level; therefore, you should not  
21 have changed it in 2005.

22 I want to close by saying I testify at a  
23 number of hearings like this, and when I get done, I'm  
24 frequently approached by injured workers who will come  
25 up to me and say, thank you for your hard work in this.

1 And I look at them and I think, I'm sitting at my  
2 computer looking at my screen looking at the laws.  
3 That's not hard work. Hard work is trying to pay for \$4  
4 a gallon gas and \$4 a gallon milk when you're getting  
5 the benefits cut the way they have been. Hard work is  
6 explaining to your family why you can't pay for new  
7 clothes for your kids to go back to school. Hard work  
8 is explaining to your landlord why you can't pay your  
9 rent because the benefits were cut.

10 There's some real people out there that are  
11 being affected by this. That's hard work, and it  
12 doesn't have to be that hard for them. You've got a  
13 chance to do something about it. I ask that you do.  
14 Thank you.

15 MODERATOR NEVANS: Okay. I'm not sure of the  
16 last name here, but it's Terry from SEIU.

17 MS. RE: That's R-E. Re.

18 MODERATOR NEVANS: R-E. Okay. I thought that  
19 was it, but then I thought maybe I was missing  
20 something.

21 MS. RE: Yeah. You could have called me Re.  
22 I would have known.

23 Good morning. Thank you very much for  
24 allowing this public testimony on this really important  
25 subject. I am a representative from SEIU 1000, the

1 California State Employees Association or -- I don't  
2 believe I did that. Did I do that. The Service  
3 Employees International Union. Whoa, that was stupid.

4 And with that we represent 95,000 potential  
5 injured workers in the California State Service, and  
6 also claims adjusters, DEO rating people, and the people  
7 from the DWC and the workers' comp.

8 If I may, SB899 clearly negatively impacted  
9 the community of injured workers. It made adjusting  
10 very difficult, as you were expected to adjust the  
11 permanent disability by minus 15 or plus 15 percent  
12 whether you returned -- whether the injured worker  
13 returned to work, which reduced their permanent  
14 disability.

15 The reduction of permanent disability based on  
16 your prior injuries is more far-reaching than the  
17 earlier legislation. In addition, the way that the  
18 multiple injured workers -- the multi-injured body parts  
19 is combined into a single PD rating, now adds up to an  
20 entirely different pyramid for what was the old rating.  
21 The old rating was based on your actual permanent  
22 disability. The new rating is based on whether you can  
23 return to work or what your capacity to return to work  
24 is.

25 One of the major concerns I had when 899 went

1     into effect was that I felt that it really reduced  
2     workers' comp completely in California. The vocational  
3     rehabilitation benefits were reduced. The recovery  
4     disability benefits were shortened, which really makes  
5     an impact on permanently disabled people.

6             If you have an injury of -- if you have a back  
7     injury, a severe back injury, now you can have some  
8     extended benefits, but up until this last year, your  
9     disability was two years. And if you have a bad  
10    shoulder, you can recover in two years. If you have a  
11    severe spinal injury, you cannot recover in two years.  
12    And then you're based on the permanent disability, then  
13    you go into the permanent disability situation, which is  
14    very nuanced.

15            The carriers use the disability evaluation  
16    unit ratings as an adversary -- as a -- as a -- God,  
17    what's the word. I just wrote it down. As -- not  
18    adversarial. Thank you. The audience is helping me.  
19    As -- to start with, you know. And they'll -- they'll  
20    adjust it down when they're dealing with your attorney.  
21    So it doesn't mean that you have a DEU rating and that's  
22    what you're going to get if you're permanently disabled.

23            So that really means that the permanent  
24    disability rating, if the numbers are wrong or your  
25    rating -- the numbers are already wrong because the old

1 rating was better, you're going to get a reduced  
2 disability on top of that.

3           You know, the -- it's very flawed. It also is  
4 open to the carriers discussing what the disability  
5 should be with the doctors, and that goes on. And that  
6 also -- I'm doing really great here. It's -- you know,  
7 the decreased -- decreased permanent disability in  
8 severity limits an injured worker's ability to secure  
9 legal representation because if you know your disability  
10 rating is going to be very low, you know, Aps (ph)  
11 attorneys want 12 to 15 percent of that coverage, and  
12 they deserve it because they have to deal with carriers,  
13 then they're not -- you know, you're not going to get an  
14 attorney because you can't afford an attorney because  
15 you're going to have to try to live on that permanent  
16 disability, which is impossible.

17           I mean, we have -- you know, like three or  
18 four years ago, we had the -- you know, the lowest --  
19 Massachusetts' permanent disability was rated the same  
20 as our temporary disability. We're -- you know, we're  
21 like the 50th in the nation. We're -- we have-- you  
22 know. I mean, we have a thriving community. We have  
23 good businesses. We have, you know, a lot of financial  
24 wealth in California, but if you're hurt, you get none  
25 of that.



1           And, you know, they keep on saying like 15  
2   percent or 16 percent is going to raise it, people are  
3   going to be taking advantage of this. If you have a 10  
4   percent rating, that changes it to 11 -- you know, 11.5  
5   or 11.6. 15 percent, if your -- if your benefits have  
6   gone down 15 percent because of the old legislation,  
7   899, which I'm sorry to say I think that it was lousy  
8   legislation, but -- so you have a 20 percent disability.  
9   That brings it up to 35.

10           I mean, in the big scheme of things when your  
11   benefits are only -- you know, the rating -- you get 170  
12   a week, 240 a week, you know, that's not very much  
13   money, you know. And I think that -- that we really  
14   need to at least make it 15 percent. You should double  
15   it or triple it to give it the permanent -- the injured  
16   worker in California an ability to recover their lives,  
17   make -- go back to -- you know, to find some kind of a  
18   way to go back to work. To recover from these severe  
19   injuries they have, if they have permanent disability,  
20   and to begin, you know, part of the society again.  
21   Because when you reduce these people's benefits, what do  
22   they do? They become welfare people. They become  
23   homeless people. They -- they don't contribute to  
24   society any longer, you know. You have to be able to --  
25   these were working individuals that had families and

1 part of society, and now they're reduced to people that  
2 don't have any part of society. They're a drain on our  
3 society. And you really need to, you know, make the  
4 legislation such that it's much more than 50 percent.

5 Thank you for allowing me to speak.

6 MODERATOR NEVANS: Okay. The next name on  
7 here I can't read so I'm going to say your address. So  
8 when you come up, spell your name for the court  
9 reporter. 1140 15th Street. Somebody here who has a  
10 phone number of 510-237-4635? I absolutely can't read  
11 it at all. The last name begins with an M. That's all  
12 I know for sure.

13 Okay. Well, I will be asking again at the end  
14 if there's anybody who wants to testify. Mike McClain.

15 MR. McCLAIN: Good morning. My name is Mike  
16 McClain. I am General Counsel for the California  
17 Workers' Compensation Institute, and I appreciate the  
18 opportunity to address the panel. First I would like to  
19 compliment the Administrative Director and her staff for  
20 accomplishing a very complex and difficult task and  
21 doing so in a very open and inclusive fashion involving  
22 all participants in the workers' compensation system.  
23 We appreciate the ability to attend advisory hearing --  
24 advisory meetings and those sorts of things. I think  
25 that's been an excellent process.

1           As indicated in the initial Statement of  
2   Reasons, the Administrative Director accomplished her  
3   task under 4660 with the use of analysis from the  
4   Commission, from reports from the Workers' Compensation  
5   Rating Bureau, and from their own analysis of an  
6   18-month period of permanent disability rating. I think  
7   that the Administrative Director understands her role  
8   under 4660 very carefully and has done exactly as much  
9   as that statute allows her to do, allows the  
10   Administrative Director to do. She's corrected and  
11   addressed the equity issues within the Permanent  
12   Disability Rating Manual, and that is what she's  
13   permitted to do.

14           Labor Code Section 4660 is very explicit in  
15   defining the elements of the permanent disability rating  
16   formula, and the authority given to the AD to update the  
17   schedule. It gives the AD authority over the express  
18   elements of the permanent disability rating formula  
19   contained in the statute, and nothing more.

20           The AD can neither increase nor cut benefits,  
21   and the difference between Mr. Gerlach's opinion,  
22   neither AD, neither the 2005 schedule nor the proposed  
23   2009 schedule, will function to cut benefits.

24           We agree that that's not the role -- that  
25   adequacy role is not part of what the

1 Administrative Director can do. What cut benefits is  
2 Labor Code Section 4660. And Mr. Gerlach's discussion  
3 is more appropriate in the legislative form, which I  
4 know he's also been there and he's also been in the  
5 litigation form; but there's not much that the  
6 Administrative Director or the agency can do about this.

7 I think the CAAA is asking the Administrative  
8 Director to pursue a policy debate, which is ongoing in  
9 the legislature, and yet you have no authority to deal  
10 with that.

11 Some responses to Mr. Gerlach's testimony.  
12 That testimony has appeared before you in the past.  
13 That testimony has appeared at the legislature, and  
14 Mr. Gerlach has appeared in a number of actual trials  
15 for injured workers in the litigation form at the  
16 Workers' Compensation Appeals Board.

17 In two cases from the en banc opinions from  
18 the appeals board in Costa and Boughner, that testimony  
19 has been rejected, out of hand. In the Boughner case  
20 you had the testimony of Dr. Reville by transcript. You  
21 had the testimony of Administrative Director Hoag by  
22 transcript. The -- the workers' compensation judge in  
23 that case agreed with the position of the injured worker  
24 and essentially invalidated the 2005 Permanent  
25 Disability Rating Manual.

1           The appeals board held that case for a year  
2   and analyzed that testimony for a year and came out  
3   after the Costa case and specifically rejected the  
4   notion that Administrative Director Hoag failed to base  
5   her 2005 rating manual on empirical evidence,  
6   specifically found and cited the empirical evidence that  
7   she relied on that Dr. Reville talked about,  
8   specifically rejected Mr. Gerlach's in court testimony  
9   about these issues, and specifically rejected the  
10  interpretation of Dr. Reville's comments before the  
11  legislature.

12           Costa did a similar thing and simply very  
13  clearly found that the Permanent Disability Rating  
14  Manual in 2005 was appropriate and was valid. And when  
15  you look at the detailed nature of Costa and Boughner  
16  and the things that they looked at and you hold that up  
17  against what Administrative Director Nevans has done  
18  with regard to the proposed 2009 schedule, you would  
19  have to say that there's even more supporting evidence,  
20  and even more empirical data, and more specific data  
21  collected by the Division itself and looked at from  
22  other agencies to deal with that.

23           I think it's fairly clear that CAAA's  
24  complaint is a policy question that belongs in the  
25  legislature. It's there now. And they can make it, but

1     there's very little that the Administrative Director can  
2     do that she hasn't already done with regard to the  
3     proposed manual.

4             And again, I appreciate all the work that's  
5     gone into this effort, and thank you very much.

6             MODERATOR NEVANS: Okay. Christy from the  
7     California Firefighters.

8             MS. BOUMA: Good morning. Christy Bouma,  
9     California Professional Firefighters. I also stand  
10    here representing Angie Wei of the California Labor  
11    Federation which the members asked me to concur on her  
12    written comments in my public comments today. I shall  
13    not repeat the statements of many of those who have  
14    come before you opposing these regulations, mostly  
15    because repetition is unnecessary. The truth stands on  
16    its own.

17            I would probably just try to summarize by  
18    saying that it's our impression that the original  
19    schedule done by the previous Administrative Director  
20    and the updates that are proposed here, seem to reflect  
21    a different reading of 4660. Maybe something like  
22    notwithstanding empirical data, the Administrative  
23    Director can adjust the schedule as the Division sees  
24    fit. That's how it feels to the injured workers.  
25    That's how it feels to firefighters who have injuries

1     that most often are career-ending, if not in the first  
2     outset, certainly as they receive multiple injuries on  
3     the job. So they go from valued public servants,  
4     pillars of their community, to sometimes an  
5     embarrassment and a disgrace in their community when  
6     they can't pay their bills, maintain their house. And  
7     that as public members of the community, it's a disgrace  
8     and there's really not a lot of resources out there for  
9     them to recover from that.

10           And so I will just close my comments with  
11     imploping you that you not -- not withstand any  
12     empirical studies but take a look at the very studies  
13     that said, yes, there's some inconsistencies in the old  
14     schedule. Some are too -- the ratings are too low, some  
15     are too high. So balance them out. Don't take the  
16     lowest common denominator and apply that across the  
17     schedule and then come back in five years and bump it  
18     back up by 16 percent. It's mostly inadequate. People  
19     are suffering under this schedule, and the one that will  
20     be proposed. Thanks for your time.

21           MODERATOR NEVANS: Joanna Gin.

22           MS. GIN: Hi. Joanna Gin with SEIU Local 1000  
23     State Employees, and I'd like to introduce Kathleen  
24     Collins, who's our VP for bargaining, but also claims  
25     adjuster who will be providing testimony. Thank you.

1 MS. COLLINS: Hi. Just a little background.  
2 SEIU Local 1000 represents over 95,000 state workers who  
3 have been affected by the changes to regulations to the  
4 Permanent Disability Rating Schedule that went into  
5 effect after SB899 was passed. We also represent the  
6 workers' compensation consultants and disability raters,  
7 claims adjusters who have witnessed firsthand the policy  
8 changes and their impact.

9 My self as a claims adjuster, your hands are  
10 tied. Basically you have a claimant on the line that's  
11 calling you and they're crying, and you adjudicated the  
12 claim. You paid the benefits per the hearing and per  
13 the legislation, and it's a very heart-wrenching  
14 situation, and there's not much you can do. I'm sure  
15 others have testified with the stories.

16 My particular situation, I work for state  
17 contract, so what I adjust are the claims for state  
18 workers. And some of the agencies that I represent are  
19 CalTrans workers who have a very high death rate, plus  
20 they have significant injuries, permanent disability  
21 ratings, mostly spinal injuries and things like that.  
22 And the SB899 permanent disability rating, as previously  
23 testified to, just doesn't compensate for this type of  
24 an injury.

25 The reduction of the PD benefits based on the



1 prior injuries is for more reaching than the earlier  
2 legislation. In addition, the way that multiple  
3 injuries, injuries to different body parts is combined  
4 into a single PD rating, now adds up to an entirely  
5 different matter, and a cumulative total combined injury  
6 rate is significantly lower.

7 Our disability raters have rated several  
8 claims in the PD. They come out with zero, but they're  
9 still significant work restrictions and work limitations  
10 imposed, but there's no monetary award. And so there is  
11 a great concern of the adequacy of the 2005 PDRS.

12 And I want to urge that the PDRS be amended,  
13 corrected to bring equity and fairness for the  
14 California injured workers. I think the war on injured  
15 workers needs to stop. Multiple studies have confirmed  
16 that the 2005 PDRS results in substantial reductions of  
17 the permanent disability benefit for injured workers.  
18 Thank you.

19 MODERATOR NEVANS: I believe that's everyone  
20 who has signed in and checked that they wanted to give  
21 oral testimony today. At this point I'm going to ask if  
22 there's anybody else in the audience who would like to  
23 come up and give testimony today.

24 What time is it right now?

25 MS. GARD: 11:20.

1           MODERATOR NEVANS: Okay. It's 11:20 right  
2 now. We're going to reconvene at -- oh.

3           MS. ATCHERLEY: My name is Linda Atcherley,  
4 A-T-C-H-E-R-L-E-Y. I'm a member of the California  
5 Applicants' Attorneys Association, and I was Immediate  
6 Past President of the state organization, and I'm the  
7 Current Legislative Chair. I was also President of the  
8 local San Diego Chapter for the Applicants' Attorneys  
9 Association. I have been practicing for about close to  
10 20 years doing workers' comp and other representation of  
11 injured workers. So I'm not testifying here today in my  
12 position as CAAA, which I did yesterday, but I would  
13 just like to reenforce a few things.

14           One is a great proportion of injured workers  
15 tend to be in the older category, that is 41 and above.  
16 The schedule here removes the current increases for  
17 those workers. These are a protected class of workers  
18 under the Government Code 12941. They also have, with  
19 the removal of vocation rehabilitation, I no longer have  
20 the ability to tell someone when they ask me, what can I  
21 do now. All right. The construction trades, the  
22 janitorial trades, a lot of people do not have  
23 transferable skills. They don't have language skills.  
24 And so when you're older and you don't have transferable  
25 skills and no way to get them -- a voucher is one way

1 but not an effective way -- then the impact of an injury  
2 on an older worker is incredible.

3 Not only that, you know, we take the snapshot  
4 here in the -- in the schedule is the date at the age of  
5 injury. So a person could be 41 at the date of injury  
6 and actually be 43 at the date they're rated. They  
7 could be 55 at the age they're rated. So their actual  
8 ability to compete on an open labor market, their  
9 ability to get work, is the age they are when they're  
10 released from treatment and have reached maximum medical  
11 improvement, not what they were two years before, five  
12 years before, ten years before, 12 years before.

13 So it's really important that we take a really  
14 hard look at what we're doing to older injured workers  
15 and the impact of the schedule. I will also say that  
16 practically I rated a couple of cases before the  
17 testimony in front of the Senate Rules Committee. I had  
18 a 42-year-old and a 49-year-old. One was a prison  
19 guard, the other one was a California Highway Patrolman.  
20 Both of them received a 5 percent increase with the new  
21 FEC variance. By the time I got through with the age  
22 adjustment, there was a net 1 percent increase in the  
23 overall formula for rating disability.

24 This is not right for an injured worker who  
25 has nothing left but a few weeks of temp -- permanent

1     disability to try to get them over to another job to  
2     keep their mortgage payments, to keep the gas payments  
3     going. The current weekly rate for permanent disability  
4     is about that of -- is below that of the state average  
5     weekly wage, minimum wage. So you're giving people  
6     nothing and then expecting them to support themselves  
7     and their family, find their own jobs, find a transition  
8     where they really have a severe impact on their ability  
9     to compete with other younger folks. It's bad enough  
10    when you get a job and then they try to fire you because  
11    you're older.

12                So I think that you really need to take a hard  
13    look at what the overall impact is in making one 16  
14    percent increase on one hand, and then you're taking  
15    away the increases on the other hand to people that  
16    really need every single dollar that they can get.

17                We heard testimony in Los Angeles from injured  
18    workers that brought their whole families over. And,  
19    you know, I really thought that with everybody  
20    testifying, their testimony -- and last the testimony  
21    was most effective when he said, when an injured worker  
22    -- an injury doesn't just affect the worker; it affects  
23    the entire family. And that's absolutely true.

24                Many times when we come to discuss permanent  
25    disability, I have the injured worker and the entire

1 family, what are we going to do next, what options do we  
2 have. You know, do we this, do we do that. And, you  
3 know, it's very important that they have more options.  
4 And the permanent disability indemnity, I'm not saying  
5 it needs to be extravagant, but it certainly needs to  
6 fulfill the constitutional mandate that at least  
7 provides a bridge for them to go and get their own job  
8 and some support for their families while they do that.

9 The other thing is, you know, I really think  
10 that the occupations need to be taken a look at. You  
11 know, and I understand all the stuff about equity and  
12 adequacy, but you know, equity between body parts is  
13 absolutely meaningless if your benefits are inadequate.

14 And 4660, I have to agree with Mark Gerlach.  
15 There are many occasions when I don't, and I'm not going  
16 to tell you where I disagree with him, but -- but he's  
17 absolutely right here on these issues that 4660,  
18 overall, mandates no change in the overall system of  
19 workers' comp in terms of what the overall averages  
20 should be. And RAND clearly said that the -- the  
21 benefits under the 1997 schedule were inadequate.

22 So we're not even asking to you address more  
23 adequacy. It's the same inadequate benefit. And the  
24 other thing, you know, we always skate over this, but we  
25 moved to an objective system, and we moved to an

1 objective system so all these stories about the touchy  
2 feely backs and people just going ow, ow, ow and they're  
3 getting overcompensated and -- not that I ever agree  
4 with any of that testimony, but we really moved to an  
5 objective system. So these people that are getting  
6 ratings, they have loss of range of motion, they have  
7 loss of limbs, they have loss of their eyes, they have  
8 loss of their hearing, they have loss of their toes,  
9 they have a loss of the use of their -- these particular  
10 body parts, and they're verified by objective studies,  
11 by MRIs, CT scans, sleep studies of some great cost, you  
12 know, monofilament testing for sensory loss and strength  
13 loss.

14           And so for us to sit here and say, well for  
15 those people that have those very -- and it's not that  
16 easy, by the way, to get an objective finding. It's  
17 just not. All right. You know, there's a lot of things  
18 that don't show up on an x-ray. There's a lot of things  
19 that do not show up on -- carpel tunnel is one very good  
20 area where a lot of these people are losing their jobs  
21 and getting nothing, but they don't have the objective  
22 studies, even after surgery, to support any kind of an  
23 objective finding for that.

24           So I think that you really have to take a look  
25 at what you're doing with the people that have these

1 objective impairments under the AMA guides, and do  
2 something that's fair and just within the parameters of  
3 the what the California Constitution requires, which is  
4 that we provide for the health, safety, and general  
5 welfare of the injured worker and those dependent upon  
6 them for support, and then look at what this schedule  
7 does. And I think that, you know, that -- that more  
8 significant benefit than 16 percent increase is  
9 warranted. Thank you.

10 MODERATOR NEVANS: Okay. Is there anyone else  
11 who wants to give oral testimony? Does that mean yes,  
12 Steve?

13 MR. CATTOLICA: I wouldn't walk out before  
14 this is over. My name is Steve Cattolica. I represent  
15 the California Society of Industrial Medicine and  
16 Surgery, whose members by and large provide a fair  
17 proportion of the medical legal and AMA reports upon  
18 which permanent disability is sometimes determined.

19 I only wanted to reenforce what you have heard  
20 with respect to the need to take a hard look at what was  
21 begun in 2005 and what may be perpetuated by the current  
22 proposal. I think it's significant that the California  
23 Workers' Compensation Institute saw fit to provide  
24 verbal testimony today based on what you heard from the  
25 consultants to the California Association -- California

1 Applicants' Attorneys Association.

2           When you throw a rock at a pack of dogs, the  
3 one that yells the loudest is the one you hit. I think  
4 there's something to not only what Mark said in fact but  
5 in concept. There's nothing that is necessarily --  
6 there's no precedent to simply nibbling around the edges  
7 of the current formula, the current methodology, that  
8 keeps you from taking a look at what could have been  
9 done correctly the first time based on what RAND said  
10 and what they developed, and comparing it to, as what I  
11 just mentioned, nibbling around the edges of what is  
12 currently a poor formula to look fundamentally at what  
13 the difference would be and make a decision based on  
14 that. And I would suggest that that be part of, without  
15 undue delay, part of what the Division takes a look at.  
16 There is no reason you can't start from ground zero, and  
17 in fact, that may be the right thing to do. Thank you.

18           MODERATOR NEVANS: Is there anyone else who  
19 wants to provide oral testimony?

20                           (No response.)

21           MODERATOR NEVANS: Okay. We're going to take  
22 a lunch break. We're going to reconvene at 12:30.

23                           (Conclusion of tape number 1. A recess  
24 transpired.)

25   --oOo--



1 (Beginning of tape number 2)

2 MODERATOR NEVANS: -- 2009 Permanent  
3 Disability Rating Schedule. The next person we have  
4 signed up to speak is Angie Wei.

5 MS. WEI: Thank you very much, Madam  
6 Administrative Director. My name is Angie Wei, and I  
7 represent the California Labor Federation. We are the  
8 state AFLCIO representing over 1,200 affiliated local  
9 unions and two-million members across the state. I am  
10 very proud to say that today is the kickoff of our  
11 convention, in which we have over 600 delegates down the  
12 street at the Oakland Marriott making our endorsements  
13 and supporting our workers and our members in the wages,  
14 hours, and benefits issues that we fight so dearly for.

15 It is unfortunate that our delegates could not  
16 come en masse here. We're running a little bit late at  
17 convention and we have a big rally to the port in just a  
18 few minutes that I have to go back and marshal for.

19 All that being said, we are here to deliver  
20 our disappointment with these revised Permanent  
21 Disability Rating Schedules. I want to acknowledge that  
22 a -- the fact that this Administrative Director has  
23 issued a revision we are pleased with. That shows that  
24 there is some -- a new revised schedule acknowledges  
25 that there are short -- shortcomings and shortfalls in

1 the existing schedule, but a paltry 16 percent increase  
2 in benefits is just not enough when injured workers, on  
3 average, have lost over 50 percent in their permanent  
4 disability benefits and nearly 70 percent of the total  
5 PD dollars have been deleted from the schedule.

6 The schedule, we're nearing four years of  
7 slashed benefits for the most severely injured workers,  
8 and it's an abomination that these workers continue to  
9 suffer under such a short schedule. Where ever I go, I  
10 talk to people that I meet sitting next to me at the  
11 restaurant, maybe at the bar, at the mall, because you  
12 can tell who's an injured worker. You can see the  
13 despair on their face and the desperation of the need to  
14 reach out to anybody that they can for help.

15 I've talked to workers who have gotten rated  
16 under the new schedule, and they simply are seeking  
17 options to continue to survive, shacking up with family,  
18 moving out of state, anything to be able to get by to  
19 supplement their safety net benefits. I have spoken  
20 with workers who got rated under the old schedule, and  
21 they too, even under the old schedule, can barely get  
22 by.

23 The data is very clear. Even under the old  
24 schedule, our permanent disability benefits did not do  
25 the job that they were supposed to, which is to replace

1 wages for injured workers. Under this new schedule,  
2 it's even worse.

3 For us in organized labor, we believe that the  
4 best way -- the best outcome for injured workers is to  
5 get them back to work. It's the best outcome for  
6 employers and employees, but for some, we simply cannot  
7 get back to work. And for those workers, for those  
8 injured -- most severely injured workers, we need a  
9 schedule that demonstrates humanity and a recognition of  
10 what families need to survive.

11 Looking at this new schedule, we've done some  
12 analysis based on the Administrative Director's three  
13 studies that the Division has produced over the last 18  
14 months or so. Again, we do appreciate this director  
15 doing the studies and completing the data analysis  
16 that's needed to revise the schedule, but if we were to  
17 even use the Division's data, we think that doubling PD  
18 benefits wouldn't be too much to ask for.

19 The schedule itself shows that the -- the  
20 schedule shows it's still too low when you look at the  
21 uncompensated wage loss report issued by the Division.  
22 The Division's study shows that the average spine injury  
23 has a three-year wage loss of \$29,600 even after  
24 compensation received in PD benefits. The average award  
25 under the newly proposed schedule would be 19,435. This

1 increased award is still more than \$10,000 lower than  
2 what DWC estimates to be three-year wage loss.

3 And while it looks like 2/3s of wage loss is  
4 replaced, we must keep in mind that wage losses continue  
5 long past three years and long after the PD award is  
6 over.

7 I do want to be on the record to say we  
8 appreciate the Division's work on this issue, the  
9 acknowledgment with the revised schedule that something  
10 needs to change, and we do think that more change needs  
11 to happen.

12 We implore the administration to allow the  
13 Administrative Director to do what needs to be done, and  
14 that is to incorporate the data of the Division,  
15 increase these benefits to where the data would require  
16 them to be, and to modify this rating schedule before it  
17 gets finalized to bring back at least a modicum of  
18 dignity to the injured workers who deserve it so much.

19 I do want to also thank Carrie Nevans for  
20 facilitating my ability to come over and present our  
21 comments today. We have submitted them in writing.  
22 Thank you very much for allowing me to be here.

23 MODERATOR NEVANS: Is there anyone else who  
24 would like to provide oral testimony?

25 MR. RANKIN: Good afternoon. Tom Rankin with

1 the California Alliance for Retired Americans. I am  
2 here to support the remarks that you just heard from  
3 Angie Wei. I was involved in the legislation of 2004,  
4 and I can assure you that the intent of the language in  
5 the law was to rationalize the rating schedule, not to  
6 turn it into a weapon to be used against injured  
7 workers, which is actually what has happened with it.  
8 And so it's time, you know, that -- you have to look at  
9 this whole thing, I think, in context of what's  
10 happened to workers' comp premiums over the last four  
11 years or more, since there were reforms enacted before  
12 the 2004 reforms which were responsible for a great  
13 deal of the savings that have been achieved to  
14 employers; and you have to look at the savings that  
15 have been achieved and you have to look at the profits  
16 that the insurance industry has reaped and continues to  
17 reap in making your decision.

18 There is plenty of room for increase in the  
19 benefits for injured workers, and they deserve it. The  
20 way the schedule has worked, it's taken away money from  
21 people. It, as Angie said, it has increased the  
22 uncompensated wage loss. That was not the intent of the  
23 legislature or I believe of the Governor in enacting the  
24 law, and the Administrative Director has the flexibility  
25 to make the schedule work for injured workers, and we

1 hope that she does. Thank you.

2 MODERATOR NEVANS: Is there anyone else that  
3 wants to provide oral testimony?

4 (No response)

5 MODERATOR NEVANS: Okay. And again, we'll be  
6 taking written comments until 5 p.m. today, so at this  
7 point I'm adjourning this hearing. Thank you.

8 (Whereupon, the Division of the Workers'  
9 Compensation Schedule for Rating Permanent Disabilities  
10 Public Hearing was closed.)

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1 CERTIFICATE OF SHORTHAND REPORTER

2 I, TERRIE CULP-SMITH, a Shorthand Reporter, do  
3 hereby certify that I am a disinterested person herein;  
4 that I reported the preceding in shorthand writing from  
5 the tapes that were provided to me; that I thereafter  
6 caused my shorthand writing to be transcribed into  
7 typewriting.

8 I further certify that I am not of  
9 counsel or attorney for any of the parties to said  
10 proceeding, or in any way interested in the outcome of  
11 said proceedings.

12 IN WITNESS WHEREOF, I have hereunto  
13 set my hand this 26th day of July 2008.

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23 Terrie Culp-Smith

24 Shorthand Reporter

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